BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNY L. OMO	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,056,924
STEVEN VOLKSWAGON	)	
Respondent	)	
AND	)	
	)	
WICHITA AUTO DEALERS SELF-INS. FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the December 20, 2013, Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on April 23, 2014, in Wichita, Kansas.

APPEARANCES

James A. Cline, of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant to have a 6 percent impairment of function to the body as a whole as a result of his work-related injuries on July 15, 2011.

Respondent appeals, arguing claimant did not sustain permanent impairment as a result of the July 15, 2011, accident, and, at most, the accident resulted in an aggravation of claimant's preexisting condition. Respondent contends the accident was not the

prevailing factor causing claimant's subjective symptoms and leading to his impairment. Therefore, he is not entitled to compensation.

Claimant contends the evidence proves he had no preexisting neck or shoulder problems, but did have persistent complaints after the work accident. Therefore, the preponderance of the evidence supports a 12 percent whole body functional impairment.

The issue on appeal is whether claimant sustained permanent impairment as a result of the July 15, 2011, accident, and was the work injury the prevailing factor in causing his permanent impairment.

FINDINGS OF FACT

Claimant's job for respondent was to retrieve parts as needed. On July 15, 2011, claimant was tasked with retrieving two toolboxes from a Volkswagon dealership. Claimant testified he was told there would be five to six people available to help him, but when he arrived at the dealership there was only one person. Claimant testified that the toolboxes were the size of refrigerators. He didn't think that it would be that hard to load the toolboxes in the truck, but once they started, he discovered the toolboxes were loaded with tools. After lifting the first box, claimant felt pain that raced through his left arm, shoulder and neck. He testified the pain in his left arm felt like razors. He told the guy helping him that they needed to find more people to help with the other box and indicated he might have hurt his arm. They found more help and loaded the other toolbox. Claimant went to the dealership, where he reported the incident to Tito (last name unknown). Tito instructed claimant to report the accident to Charlie Brown, the manager.

Claimant reported the accident to Mr. Brown and asked if there was a workers compensation doctor he could visit to have his arm looked at. Claimant testified that Mr. Brown told him there wasn't one and to shake it off and be careful what he lifted. Claimant reported being told by respondent that his pain would disappear. Respondent made no documentation of the injury and offered no treatment.

As the day progressed, claimant's condition got worse and, on his lunch break, he went to the VA Hospital. On July 18, 2011, claimant sought treatment at the VA Hospital for left forearm and elbow pain. Claimant denies any prior problems with his left hand, left arm, shoulder or neck. He does admit to prior low back problems.

At the conclusion of the October 6, 2011, preliminary hearing, the ALJ found claimant was injured out of and in the course of his employment with respondent on July 15, 2011, that claimant's superiors had notice of the accident, and that the prevailing factor of claimant's injury was lifting the toolboxes full of tools. Medical treatment and temporary total disability compensation were ordered paid, beginning July 15, 2011, until claimant was released.

Claimant met with Anthony Pollock, M.D., a board certified orthopedic surgeon, for evaluation on March 6, 2012, at the request of the workers compensation insurance carrier. Dr. Pollock became claimant's authorized treating physician.

Claimant told Dr. Pollock he suffered a work-related injury on July 15, 2011, while lifting a couple of heavy toolboxes into the back of a truck. Dr. Pollock noted claimant described the toolboxes as being the size of a refrigerator and full of tools. Claimant reported pain in his neck and shoulder and pain that radiated from the fingers of his left hand to his upper neck area. Claimant denied any previous history of neck or shoulder pain. Claimant reported that this current pain was frequent. He also reported keeping his left arm warm reduced his symptoms, with cold intensifying his pain.

Claimant was able to raise his left arm above his shoulder and this seemed to improve his symptoms. His symptoms were worse when his arm was down by his side. Claimant described the pain as shooting and "wire-like", radiating all the way up behind his left ear.

Claimant was not in any great distress at the time of the March 6, 2012, visit. He had full range of motion of his left upper extremity in all directions. He had reasonably good strength. His grip strength was a bit less than Dr. Pollock would have expected in someone who does the kind of work claimant does. The range of motion in claimant's neck was within normal limits, but he had pain at full flexion and full extension. Claimant did not demonstrate any true foraminal closure signs. His reflexes appeared to be normal. He was not particularly tender around the neck. He did not have Tinel's at the elbow or the wrist. He complained of decreased sensation in essentially the middle fingers and thumb. He had no loss of pulse in the AER position. He did not seem to have any obvious wasting in the muscles of the hand.

Historically, claimant appeared to have some radicular symptoms. Dr. Pollock noted x-rays of the cervical spine were normal. He thought it reasonable for claimant to get an EMG and NCT. Claimant's EMG/NCT showed no clear evidence of focal neuropathy, plexopathy or radiculopathy. Dr. Pollock diagnosed neck and left arm pain and possible cervical disc herniation. He would not allow claimant to work.

On March 27, 2012, Dr. Pollock reviewed an MRI of claimant's neck which showed some mild degenerative changes at C5-6, with some degenerative disk disease and a minimal bulge. There was no impingement on the cord. Dr. Pollock testified he didn't know when the degenerative changes occurred. He determined claimant sustained a mild strain, and would probably benefit from some physical therapy and rehabilitation exercises. He decided to keep claimant off work until he recovered. Claimant continued to complain of pain that radiated from his neck down his back in certain positions. Dr. Pollock did not feel this was a permanent problem, and scheduled claimant for physical therapy.

On April 17, 2012, claimant returned to Dr. Pollock, with continued pain in his neck and shoulder. Claimant had been attending physical therapy and performing stretching exercises, icing after physical therapy. Dr. Pollock opined that since claimant had not made much progress since July 2011, he was doubtful the treatment would work. He recommended a trial of a TENS unit and allowed claimant to do light to sedentary work if available.

On April 30, 2012, Dr. Pollock noted physical therapy had done claimant absolutely no good, and the TENS unit did not seem to be helping either. Claimant complained of constant pain in his arm and neck, which the doctor found surprising since the EMG was normal, there were minimal findings on the MRI and claimant had received persistent physical therapy. Claimant told Dr. Pollock his attorney suggested he settle the case and try to work through it. Dr. Pollock had no objection to this suggestion and, upon request, was willing to provide a rating for claimant's degenerative cervical spine. On May 2, 2012, claimant was released to regular work.

In a letter dated June 4, 2012, Dr. Pollock wrote claimant had been released from his care with no permanent restrictions, at claimant's request. Dr. Pollock went on to state he did not believe claimant had any permanent impairment of function as a result of his injury. However, claimant reported he was asymptomatic prior to the accident. If any permanent impairment rating were to be assigned, it would be a maximum of 5 percent, giving claimant the benefit of the doubt. Dr. Pollock opined this rating would be due to continued pain, probably from an aggravation of claimant's underlying degenerative arthritis. The rating would be based on symptomatic complaints and the presence of degenerative disease of claimant's spine, which preexisted his injury.

Claimant met with George Fluter, M.D., on August 15, 2012, for an examination, at the request of his attorney. Dr. Fluter's history of claimant's accident was consistent with claimant's testimony. Initially, claimant was treated at the VA hospital, with x-rays taken and pain medication prescribed. Shortly after the incident, claimant's employment with respondent was terminated. Claimant received no medical treatment for several months.

Claimant told Dr. Fluter that in April 2012, he was referred to an orthopedic surgeon, who referred him for electrodiagnostic testing. The history claimant provided indicated the testing revealed findings consistent with nerve damage. Claimant declined offered injections and was referred for 2 to 3 months of physical therapy. He was not given any medication or restrictions.

Dr. Fluter noted claimant met with Dr. Pollock from March 6, 2012 to April 30, 2012, for neck/shoulder pain and radicular symptoms. Dr. Fluter noted claimant had mild strain and Dr. Pollock treated claimant with therapy, a TENS unit and temporary restrictions. Dr. Pollock released claimant to regular work on April 30, 2012. Dr. Fluter indicated claimant was advised his pain would get worse over time, and there was nothing that could be done to treat it.

Claimant had an MRI of the cervical spine on March 26, 2012. It was interpreted by Thomas Cox, M.D., who found cervical degenerative changes resulting in mild canal and mild left foraminal stenosis at C5-6; normal appearance of the cord; and no acute bony abnormality or malalignment. The left upper extremity electrodiagnostic studies were done by Bart Grelinger, M.D., on March 22, 2012, and were interpreted as normal. There was no clear evidence of focal neuropathy, plexopathy or radiculopathy in the left upper extremity. Dr. Fluter felt that some of the findings on the MRI could be considered degenerative. He also felt that it was possible that the positive findings on the MRI could have preexisted the July 15, 2011, accident and injury. But, he couldn't be sure because the study was done roughly eight months after the accident and those changes could have occurred during the eight months.

Claimant's status at the time of Dr. Fluter's August 2012 visit was pain in the neck, left shoulder, and left upper extremity. Claimant rated his pain as high as 10 out of 10. He described the pain as severe, sharp and shooting. Claimant reported that lifting made his pain worse and did not stop when the activity stopped. He reported that the pain was constant with no pattern to it and nothing made it better. Claimant had not had any injections or bracing.

Dr. Fluter noted claimant's pain level was a 7, he was able to ambulate and transfer without an assistive device, muscle strength and bulk were within functional limits and there was altered appreciation of pinprick sensation in the left upper extremity in a non-specific pattern when compared to the right. Muscle stretch reflexes were physiologic and symmetric bilaterally; radial artery pulses were full bilaterally; shoulder impingement testing was negative on the right and positive on the left. There was tenderness to palpation over the left acromioclavicular joint; tenderness to palpation over the bicipital tendon and subacromial areas of the left shoulder, but no tenderness to palpation over the medial and lateral epicondyles of the elbows bilaterally. Tinel's sign was absent at the right wrist and elbow, but present at the left wrist and left elbow. Finkelstein's test was negative bilaterally and carpal compression was negative bilaterally. Cervical range of motion was within functional limits. However, there was pain at the end range with right lateral rotation. Finally, there was tenderness to palpation associated with taut bands in the muscles of the neck/upper back, upper shoulder, and scapular stabilizers.

From the results of his examination, Dr. Fluter determined claimant was status post work-related injury on July 15, 2011; had neck/upper back/left upper extremity pain; cervicothoracic strain/sprain; myofascial pain affecting the neck/upper back; left shoulder pain/impingement/tendonitis/bursitis; probable left upper extremity radiculitis; possible left carpal tunnel syndrome; and possible left ulnar neuropathy at the elbow.

Dr. Fluter opined that, based on the information available and to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and the July 15, 2011, reported injury. He found the prevailing factor was the injury occurring on July 15, 2011.

Dr. Fluter assigned the following impairment: 5 percent permanent partial impairment to the body as a whole for myofascial pain in the cervicothoracic spine and 12 percent permanent partial impairment to the left upper extremity at the level of the shoulder for range of motion deficits (7 percent whole body impairment). These impairments combine for a 12 percent impairment to the body as a whole. These ratings were based on the 4th edition of the AMA *Guides*.[1]

Dr. Fluter went on the assign the following restrictions: restrict lifting, carrying, pushing and pulling to 35 pounds occasionally, and 15 pound frequently; avoid holding the head and neck in awkward and/or extreme positions; restrict overhead activities to an occasional basis; restrict activities at or above shoulder level using the left arm to an occasional basis; restrict activities at or above shoulder level using the left arm to an occasional basis; restrict activities greater than 24 inches away from the body using the left arm to an occasional basis.

Dr. Fluter gave no specific diagnostic or therapeutic recommendations. He did opine that, given the nature of claimant's orthopedic conditions and impairments, future medical care is likely. He noted use of medications to modulate pain symptoms may be an ongoing need and may include a non-steroidal anti-inflammatory agent, a muscle relaxant, an analgesic agent and adjuvant medications. Interventional pain management procedures may be indicated and may include epidural steroid injections, selective nerve root blocks, facet joint injections, subacromial injections, tendon sheath injections and trigger point injections. Continued use of a TENS unit may be indicated. He did not feel there was an indication for surgical treatment at this time.

Pursuant to an agreement between the parties, claimant met with board certified physical medicine and rehabilitation specialist David E. Harris, D.O., for an Independent Medical Evaluation (IME) on January 17, 2013. The purpose of the evaluation was to provide an opinion as to whether claimant's permanent partial impairment of function was directly related to his work injury on July 15, 2011. This agreement was reached due to the differing opinions of Dr. Pollock and Dr. Fluter.

Claimant's main complaint at the time continued to be pain in the left arm, neck and shoulder. Using a pain diagram, claimant indicated pain on the dorsal and ventral aspects of the left arm with sharp pain noted over the hand, wrist, forearm, arm, and shoulder anteriorly and posteriorly. He also indicated sharp pain posteriorly at the cervicoscapular junction and the bilateral cervical region. Claimant reported his pain had become more intense since the accident. He rated his pain at a 7-8 out of 10. Claimant's pain was worse with cold temperatures and lifting. Claimant reported limited use of his upper

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

extremity. He couldn't lift more than a gallon of milk and had difficulty reaching, as both increased his shoulder pain.

Claimant reported that some of the activities he performed in physical therapy aggravated his neck pain. He received treatment including ball and wall isometric exercises and range of motion activities for the neck and shoulder, followed by cryotherapy. Claimant stated the therapist told him his pain was too chronic to make much improvement and the condition was irreversible.

Dr. Harris' physical exam of claimant revealed no atrophy with regard to either extremity; no clubbing, cyanosis or edema; good bulk symmetry bilaterally; full range of motion at the elbows and wrists for flexion, extension, supination and pronation; full range of motion in the hands and digits bilaterally; cervical range of motion demonstrated forward flexion to 40 degrees, extension to 50 degrees, lateral flexion to 35/20 degrees (left/right), and rotation 15/30 degrees (left/right). There was tenderness to palpation along the cervical paraspinals bilaterally up towards but not all the way into, the inferior nuchal ridge. The greatest area of discomfort was at the cervicoscapular junction on the left and laterally toward the shoulder, with mild tenderness over the AC joint.

There was negative shoulder structural testing, including Hawkins, Mears apprehension, Speed, O'Brien and scarf sign, bilaterally. There was some mild grimace noted with range of motion through abduction and flexion on the left. There was negative Spurling test bilaterally. Claimant's reflexes were 2/4 for the biceps, triceps and brachioradialis bilaterally. He had a complaint of allodynia over the radial aspect of the left forearm to light touch. His motor strength was 5/5 with bilateral elbow flexion and extension, wrist flexion and extension, finger abduction and grip strength and shoulder abduction with some guarding on the left. Claimant was able to exert 71 pounds of force with the right hand and 40 pounds of force with the left hand, both in position 3. With rapid exchange testing for dynamic strength, the left hand exerted up to 50 pounds and the right 70 pounds.

Dr. Harris found claimant was status post work injury on July 15, 2011; had chronic pain in the cervical spine, cervicoscapular junctions and left upper extremity; the cervical pain appeared to be related to a cervical strain injury which appeared to overlie preexisting cervical degenerative changes including canal and foraminal stenosis at the C5-6 level; and some inconsistencies on examination including poor correlation with the level of pain complaint and physical presentation as well as inconsistency between the static and dynamic strength exertion.

He went on to opine claimant presented as a complicated patient who claimed ongoing pain for 18 months since an injury, followed shortly thereafter by termination of his employment. Dr. Harris opined claimant had received a reasonable course of treatment. He opined that, although the nerve conduction testing did not identify any neuropathic or radicular etiology that might contribute to claimant's symptoms, the MRI identified a fair

amount of degenerative changes in claimant's neck, which may contribute to claimant's symptoms. The MRI also identified cervical spondylosis, disc desiccation as well as loss of disc height, endplate sclerosis and osteophytes in the cervical spine. This was noted to be predominate at C5-6 with some indentation of the thecal sac and narrowing of the spinal canal. The degeneration appeared to be more pronounced on the left than on the right and lead to some mild forminal stenosis. Additional areas of degeneration were noted at C4-5 and C6-7, but to a lesser degree than that noted at C5-6.

Dr. Harris opined that the cervical spondylosis and degenerative changes could account for the persistent neck pain as an arthritis process and the shoulder pain could be explained at least to some degree by the expected nerve root irritation of crowding to the C5-6 nerve levels which are known to provide nerve input into the shoulder region. He indicated, despite claimant denying any prior pain, MRI findings suggest a preexisting condition which was likely aggravated by the work activity on July 15, 2011, and became symptomatic as a result of this aggravation. It was Dr. Harris' opinion that claimant's symptoms are well explained by the degenerative disease in his cervical spine, and as that is a preexisting, chronic and degenerative process, his neck pain would not be compensable under the current workers compensation law. His injury does not appear to be the prevailing cause of his current symptoms. Therefore, claimant is not entitled to any impairment rating.

Should claimant's condition be found to be causally related to the July 15, 2011, work accident, Dr. Harris opined claimant would have a 5 percent impairment to the body as a whole for a minor impairment based on guarding and pain.

Dr. Harris indicated there was a note in claimant's records from NovaCare Rehabilitation showing where claimant was treated by Mario Alvarado, PT, on April 3, 2012, and it was noted claimant was fired a few days after the work injury and has not worked since then. He also noted that the records indicated at claimant's next therapy appointment, on April 13, 2012, he met with Jenni Schermuly, PTA, and reported his arm felt good, but his neck and shoulder did not and his pain was an 8 out of 10 that day.

Dr. Harris noted claimant has been receiving social security disability since 2007. Despite this disability, claimant had been able to work full-time until the injury. Claimant reported that he was fired from his job after the injury for going to the VA to see a doctor about the injury.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within

> the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2) states:

> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

K.S.A. 2011 Supp. 44-508(f)(2)(B)(i)(ii) states:

> (B) An injury by accident shall be deemed to arise out of employment only if:
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

It is uncontradicted claimant suffered a work-related accident on July 15, 2011. The dispute in this matter relates to what, if any, permanency resulted from that accident. Dr Fluter, claimant's expert, determined claimant suffered a 12 percent whole person functional impairment to his neck and shoulder, with the prevailing factor being the work related accident.

Both Dr. Pollock, claimant's treating physician, and Dr. Harris, the agreed IME physician assessed claimant a 5 percent functional impairment to claimant's cervical spine. The conflict arises when considering the cause of these varied impairments. Both Dr. Harris and Dr. Pollock assessed the functional impairment on the basis of preexisting degenerative changes in claimant's cervical spine. Neither found the prevailing factor for claimant's permanent impairment to be the accident at work.

The Board, after evaluating the medical testimony, finds the evidence provided by Dr. Pollock and Dr. Harris to be the most persuasive. While claimant suffered an accident and injury at work, the evidence does not support a finding that claimant experienced any permanent impairment from that accident. The more credible evidence supports a finding that claimant's permanent impairment, if any, is the result of claimant's degenerative condition in his cervical spine. The Board finds claimant has suffered no permanent injury in his left shoulder. As such, the Board affirms the award with regard to claimant's entitlement to temporary medical treatment and temporary disability, but reverses with regard to any permanent impairment.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the award of temporary total disability compensation, unauthorized medical treatment and the cost of medical treatment provided for claimant's accident on July 15, 2011. However, the Award is reversed with regard to the award of any permanent functional impairment resulting from that accident. Claimant has failed to prove the prevailing factor for his permanent impairment and disability is related to the accident at work.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated December 30, 2013, is affirmed as to the award of temporary total disability compensation and authorized and unauthorized medical treatment per the Award. The Award is reversed with regard to the award of permanent functional impairment.

Claimant is entitled to 39 weeks of temporary total disability compensation at the rate of $226.68, or $8,840.52. Additional functional impairment on a permanent basis is denied. In all other regards the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of May, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
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John D. Clark, Administrative Law Judge